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FILED
OCT 9 1959
JAMES R. BROWNING, Clerk

Supreme Court of the United States

October Term, 19

No. 459

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Petitioner,

vs.

FEDERAL POWER COMMISSION,

Respondent,

PAN AMERICAN PETROLEUM CORPORATION, ATLANTIC REFINING COMPANY, CITIES SERVICE PRODUCTION COMPANY, HUMBLE OIL & REFINING COMPANY, OHIO OIL COMPANY, OIL PARTICIPATIONS INCORPORATED, TIDEWATER OIL COMPANY, TRANSCONTINENTAL GAS PIPE LINE CORPORATION, CONTINENTAL OIL COMPANY, MAGNOLIA PETROLEUM COMPANY, PURE OIL COMPANY, SUN OIL COMPANY, UNION OIL COMPANY OF CALIFORNIA, W. H. HUNT, TRUSTEE FOR HASSIE HUNT TRUST, PHILLIPS PETROLEUM COMPANY,

Intervenor Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Albany, New York,
October 9, 1959

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PAN AMERICAN PETROLEUM CORPORATION, ATLANTIC REFINING COMPANY, CITIES SERVICE PRODUCTION COMPANY, HUMBLE OIL & REFINING COMPANY, OHIO OIL COMPANY, OIL PARTICIPATIONS INCORPORATED, TIDEWATER OIL COMPANY, TRANSCONTINENTAL GAS PIPE LINE CORPORATION, CONTINENTAL OIL COMPANY, MAGNOLIA PETROLEUM COMPANY, PURE OIL COMPANY, SUN OIL COMPANY, UNION OIL COMPANY OF CALIFORNIA, W. H. HUNT, TRUSTEE FOR HASSIE HUNT TRUST, PHILLIPS PETROLEUM COMPANY,
Intervenor-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The Public Service Commission of the State of New York, petitioner in the proceedings below, prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in such proceedings on August 4, 1959 (CA 3, No. 12,805).

Opinions Below.

The opinion of the Court of Appeals is not yet officially reported. Appendix A, hereto annexed, contains the opinion (A-1 to A-7), the dissenting opinion (A-7 to A-8) and the Court's judgment entered the same day (A-9), together with the Court's order denying rehearing (A-10).

The opinion, the dissenting opinion and the order of the Federal Power Commission, issued September 4, 1958, affirmed by the Court below, are reported at 20 FPC 264 (R. 481-556). The Commission's order denying applications for rehearing is reported at 20 FPC 571 (R. 602-610).

Jurisdiction.

The judgment of the Court of Appeals was entered on August 4, 1959. Petition for rehearing was denied on September 9, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1) (1948) and Section 19(b) of the Natural Gas Act, 52 Stat. 831 (1938); 15 U. S. C. §717r(b).

Question Presented.

Is not the decision of the Court of Appeals herein in direct and irreconcilable conflict with the decision of this Court in *Atlantic Refining Company* v. *Public Service Commission of the State of New York*, 360 U. S. 378 (June 22, 1959)—commonly referred to as *Catco*?

Statute Involved.

The pertinent provisions of the Natural Gas Act, 52 Stat. 821 (1938), as amended by 56 Stat. 83 (1942), 15 U. S. C. §§717-717w, are set forth in Appendix B (B-1 to B-4).

Statement of the Case.

The Commission's Opinion and Order here under review (its No. 315), issued on September 4, 1958, granted unconditional certificates of public convenience and necessity to 26 natural gas producers ("producer-applicants") authorizing sales of natural gas by them, from fields in and offshore southern Louisiana, to Transcontinental Gas Pipe Line Corporation ("Transco") at initial prices of 22.4¢ to 23.3¢ per Mcf. Simultaneously, the Commission granted Transco's related pipeline expansion application which, in large measure, was founded upon the gas acquisitions and dedications encompassed by the instant producer applications. Both of these determinations were affirmed by the Court below.

1. Factual Background.

By 39 applications filed between August 28, 1957 and March 3, 1958, 26 natural gas producers* requested certificates of public convenience and necessity to sell a total of approximately two trillion cubic feet of natural gas to Transco. All of the contracts upon which the applications were based were executed between August, 1957 and February, 1958—i. e., from 1 to 8 months following the respondent Commission's final, June 24, 1957, unconditional certification of the Cateo offshore sales at 22.4¢ per Mcf. On that date, climaxing a bitterly contested proceeding, respondent, in a widely publicized decision, had abandoned previous efforts to hold the 17.18¢ pre-Cateo, southern Louisiana producer initial price line, bowed to the demands of the Cateo producers and reversed its earlier orders imposing 18¢ initial price conditions on the Cateo sales.

* Including each of the following: Continental Oil Co., Atlantic Refining Co., Tidewater Oil Co. and Cities Service Production Co. —the Cateo combine.

At the time of the execution of the instant contracts and the filing of the instant applications, therefore, the highest certificated *offshore* initial price for natural gas was the newly authorized 22.4¢ per Mcf Cateo rate.* Four of the offshore producer-applicants in this proceeding immediately proposed to top that figure with initial prices of 23.3¢ per Mcf. Four others were content merely to equal it (R. 302-303).

At this time the maximum certificated *onshore* initial prices in southern Louisiana were reflected in relatively few sales at 20 and 21¢ per Mcf. The overwhelming majority of onshore sales, however (including many more recent), were at prices considerably below these maximum levels (R. 289-301).* For example, the highest (and the predominant) prices then being paid by Transco, the present purchaser, and by Tennessee Gas Transmission Company, the other major New York-serving pipeline then purchasing in the area, were, respectively, 17 and 18¢ per Mcf, including tax reimbursement.** The onshore producer-applicants here proposed to top all previous records with initial prices of 22.4 to 22.8¢ per Mcf, all but four at the higher figure. (R. 302-303).

Thus did the Cateo 22.4¢ price wash up onshore as the new bargaining floor. Thus did the contracts and producer applications in this proceeding, *per se* present to respondent prompt and complete vindication of the New York Commission's principal contention throughout the Cateo case—that certification of the unjustified 22.4¢ per Mcf initial price there would result in the elevation of (a) all

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* The only other offshore production dedicated to the interstate market at the time was the 17¢ West Delta, pre-Cateo sale. See *Atlantic Refining Co.* v. *P. S. C.*, *supra*, pp. 392-3.

** Purchases by these two pipelines alone accounted for approximately 20% of total interstate sales in Louisiana in 1958.

future initial prices and, ultimately, (b) all prices in southern Louisiana, to equal or higher levels.

As the evidence produced in these proceedings was later to show, the deleterious ramifications of the present contracts were not limited to those so readily apparent.

Upon receipt of the applications, respondent, through its Secretary, addressed letters dated March 27, 1958 to each of the producer-applicants, requesting information as to the basis used in arriving at their proposed prices. These letters, contrary to respondent's later finding on the same subject, noted the fact that the respective prices were higher than rates for any other interstate sales in the area (R. 314-371).

2. The Hearings.

Hearings on the producer applications were held in May, 1958. The record there compiled was identical, in substance, with that of the Commission's Catco hearings of a year earlier. That is, each applicant offered, as the sole support for its certificate request, evidence that its contract with Transco was the product of arms-length negotiation (R. 29-111). Similar information was furnished in response to the letters of respondent's Secretary (R. 383-406).

Respondent did not, however, here repeat its unorthodox Catco procedure of disassociating the producer applications from the related pipeline application. In Catco the Commission had based its final producer certificate order, *inter alia*, on its finding of a great "need" for additional gas by Tennessee, although, at the time, Tennessee's related certificate application had not yet been heard and no evidence of its "need" had yet been introduced in the Catco or any other record. Here, respondent scheduled Transco's certificate hearings in March and April 1958 and thereafter

consolidated the pipeline and producer dockets for oral argument and final Commission disposition. Thus, Transco had a concurrent opportunity to establish that it "needed" (i.e. had a market for) the additional gas it proposed to acquire from the producers. Transco's distribution company customers, in turn, had an opportunity to establish that they "needed" (i. e. had a market for) the additional gas they proposed to acquire from Transco.

There was, of course, nothing remarkable about this evidence. Indeed it would have been astonishing had Transco and its customers not been able to demonstrate their ability to dispose advantageously of gas supplies they were seeking permission to obtain. Much more surprising was the evidence, adduced through Transco witnesses themselves, that certification of the sales at the proposed initial prices would (a) necessitate an immediate rate increase by the pipeline, then estimated at 2¢ per Mcf* (R. 265-288), and (b) trigger existing prices under favored nation clauses in 35 of its other, existing gas purchase contracts in amounts totalling approximately $5,000,000 per annum (R. 124-125).

At the hearings and in its briefs before the Examiner and the Commission this petitioner contended that this evidence was wholly inadequate to justify the proposed initial price or to sustain unconditional certification of the sales at those initial price levels, and that—on the contrary—it clearly showed that such unconditional certification would not be in the public interest. Certificates of public convenience and necessity should be issued, we contended, only upon condition that the initial prices be reduced to 17¢

* Subsequent events demonstrated that Transco underestimated its required increase by nearly 100%. Its actual filing, scheduled to become effective subject to refund on November 18, 1959, calls for an increase of 3.97¢ rather than 2.0¢ per Mcf. Docket No. G-18783.

per Mcf. This was the highest price Transco was then paying for gas in the area and the highest initial price that appeared to be above criticism, i.e. not adverse to the interests of the consuming public.*

3. The Intermediate Decisions.

The Presiding Examiner issued his intermediate decision on the producer applications on June 17, 1958 (R. 408). By that date, a series of recent decisions by the Commission in producer Section 7 cases had effected a fundamental and critical change in the entire producer initial price certification picture and had virtually preordained the Examiner's decision here. In March, April and May 1958, in a group of uncontested (and consequently unreviewable) proceedings, of which several were heard and decided under the shortened procedure method (i. e., without submission of evidence, pursuant to Section 1.32 of the Commission's Rules of Practice and Procedure, 18 C. F. R. 1.32), respondent had taken occasion

1. to certificate southern Louisiana sales to other pipelines at initial prices up to 22.8¢ per Mcf**—thereby eliminating all but four of the instant contracts as initiators, in and of themselves, of new initial price plateaus—and

2. to shift the burden of proof of public convenience and necessity, procedurally, from applicants for certifi-

* The 17¢ rate charged by all Transco's southern Louisiana suppliers, including some of the producer-applicants herein, represented a still "unapproved" increase from their former charges of 9.797¢ per Mcf. Although the increase from 9.797¢ to 17¢ became effective and has been paid since 1955, the 17¢ figure *has not yet been demonstrated*, to the satisfaction of either respondent or the courts, to be a just and reasonable charge. See e.g., *Bel Oil Corp.* v. *F. P. C.*, 5 Cir. 1958, 255 F. 2d 548 and *Sun Oil Corp.* v. *F. P. C.*, 5 Cir. 1958, 253 F. 2d 557, *cert. den.* in both 358 U. S. 804.

** See e.g., *Southern Natural Gas Company, et al.*, Doc. No. G-13082, *et al.*, 19 F. P. C. 558.

cates to intervenors who questioned the propriety of proposed initial prices or requested initial price conditions; and to alter its minimal content, substantively, so as virtually to guaranty immediate unconditional producer certification at any initial price proposed regardless of its effect on the consuming public.*

Thereby the Commission effectively eliminated any possibility of repetition of its *Catco* fiasco, in which it ultimately found itself embarrassed by its own initial findings that the *producers* had not discharged *their* burden of proving public convenience and necessity of the there authorized 22.4¢ initial price.

In the face of these decisions, which he considered binding precedents, the Presiding Examiner, with obvious reluctance, concluded that he was compelled to recommend unconditional certification of the instant producer sales (R. 419-423).

On July 9, 1958 he also recommended certification of the related pipeline project (R. 427).

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* The new rules were first promulgated in *Hope Natural Gas Co., et al.*, Doc. Nos. G-12571; *et al.*, 19 F. P. C. 405, and thereafter applied in the decision of all producer certificate proceedings, including the present one, until forced into well deserved retirement by this Court's *Catco* decision. In summary, they provided that a producer-applicant could make out a "*prima facie*" case for unconditional certification at any initial price requested simply by submitting proof of the "existence of a market" for the gas at that price and of the "economic feasibility" of his project.

Inasmuch as gas must be discovered and produced (thus proving "economic feasibility"), and a contract of sale negotiated and executed (thus proving "existence of a market"), *before* a producer may even file a certificate application, it automatically followed that a producer's "*prima facie*" case was incontrovertibly established for him before he ever entered respondent's hearing rooms. Thereupon, respondent held, the burden of proving the *impropriety* of the proposed initial price and the necessity for any requested price condition, was upon *intervenors*. Since this burden of proof was never discharged to respondent's satisfaction, regardless of the effect of the proposed prices on the purchaser's rates or of their triggering impact, it appeared that the producer's "*prima facie*" case was, in reality, irrebutable under respondent's theory.

4. The Commission's Determinations.

On September 4, 1958 respondent issued its Opinion and Order No. 315, here complained of. Therein respondent reached its decision upon the basis of its new, post-Catco principles. That is, it found the producer applicants had a "market" for their sales at the proposed prices and that Transco "needed" additional gas. It thereupon concluded that the record sustained issuance of unconditional certificates for the sales. Although Opinion No. 315 discusses at length various aspects of the transactions, unconditional certification of the sales was predicated essentially upon these two factors alone.

Respondent dismissed the demonstrated $5,000,000 annual triggering effect of the initial prices with the observation that no triggered increases could "materialize" absent Commission "approval" of filings for proposed increases under Section 4 of the Act* (R. 486; 494-5). And, for some reason, still incomprehensible to petitioner, it apparently regarded Transco's contemplated 2¢ per Mcf increased rate filing, necessitated by the instant prices, as probative of the propriety of the proposed initial producer prices rather than otherwise (R. 489; 514).

Having thus predetermined its disposition of the matters, respondent then proceeded to disparage both the necessity for and legal propriety of its resort to exercise of initial price conditioning powers, in this or any other instance. The Commission cited Transco's contention that a 17¢—or any other—price condition would preclude acqui-

* In fact those triggered increases have not only "materialized", in the extremely practical sense that they are now being charged and collected, but respondent has permitted some of the filings therefor to become effective without suspension, without proof of their justness and reasonableness and without the possibility of refund.

sition of new supplies.* It cited *Mobile*** as "drawing into question the extent of our power to alter or vary the terms of initial contracts" (R. 491) and as positing an "underlying absence of legal authority in the premises" (R. 492; but see *Atlantic Refining Co.* v. *PSC*, *supra*, at pp. 391-2). Finally—and herein the "clincher"—the Commission expressed its marked reluctance to engage in, and general distaste for, any initial price conditioning endeavor "by which it would act as a kind of peace-time OPA for the natural-gas producing industry" (R. 493; but compare this with its duty to provide "a most careful scrutiny and responsible reaction to initial price proposals of producers under §7", and to "hold the line". *Atlantic Refining Co.* v. *PSC*, *supra*, at pp. 391-2).***

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* If imposed only upon Transco purchases, the price reduction condition might well have had such an effect. If imposed indiscriminately upon Transco, Tennessee and every other interstate pipeline purchaser, however—until and unless some producer-seller established the public convenience and necessity for a higher initial price level—such would definitely *not* be the case. *Atlantic Refining Co.* v. *P. S. C.*, *supra*, p. 394.

** *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332.

*** We have, to this juncture, for purposes of clarity posed this case as one in which the Commission again (as in *Cateo*) declined to resort to its initial price conditioning powers. That was its conclusion, i.e. "Accordingly, we conclude that the producer certificates shall not carry any initial rate conditions" (R. 492). In fact, however, *just such a condition was imposed!* Without a word of evidence in the record on the subject, without even a suggestion to the effect from any participant in the case, and in complete contradiction of its expressed views respecting the feasibility and legality of such Commission pursuits, the Commission ordered attached to the certificates issued to the producer-applicants the condition that they would each refund to Transco "that portion of the initial rate and charge, constituting the reimbursement for the additional [Louisiana severance] tax . . . paid [per contract requirement] by Transco should such tax be held invalid and refunded by the State of Louisiana." The producers were required to account therefor and bear the expense of effecting any such refund. R. 501; 518—Order Clause (D). Each readily acquiesced therein, i.e. "accepted" certificates so conditioned.

Simultaneously, certificates of public convenience and necessity were granted for most of the related pipeline expansion programs (R. 519).

5. The Decision Below.

Review below was sought (a) by petitioner and (b) by United Gas Improvement Company and Philadelphia Electric Company, two other intervenors in the proceedings before respondent. The two cases were consolidated. They were briefed and argued to the Court below *before* the issuance by this Court of its *Catco* decision on June 22, 1959. After that decision was entered, Transco and the producer-applicants, intervenors below, filed supplementary briefs with that Court urging that the *Catco* decision was not dispositive of the instant proceeding and claiming various distinctions between that case and the present one. Significantly, respondent itself did not file a supplementary brief nor did it assert any such alleged distinctions.

As phrased by the Court below (Judges Goodrich and Kalodner), the question before it was whether it was "an abuse of discretion for the Commission to grant these certificates without conditioning them as to price" (A-3). It stated that it proceeded to determination "with the text of the Supreme Court opinion [*Catco*] before us" (A-3). It concluded, nevertheless that respondent's determination, on the record before it, was "not unreasonable" (A-7).

Judge Hastie dissented, voting to "vacate the orders of the Commission in the present cases and remand with instructions to reconsider in the light of *Atlantic Refining Co. v. Public Service Commission*" (A-8).

Reasons for Granting the Writ.

Although the Court below acknowledged the pertinence of the *Catco* decision and expressed its intention of deciding

the instant case in conformity with the principles of that opinion, petitioner respectfully submits that the Court of Appeals has misapprehended the essential aspects of this Court's reasoning and that its decision is in patent and direct conflict with that of this Court. Moreover, the effects of the decision here to be reviewed will be (a) to nullify the purpose of this Court's remand of the *Catco* proceeding to the respondent and (b) to encourage continuation of the uninterrupted—as yet—upward spiral of southern Louisiana and other gas producer initial prices, a trend this Court regarded as adverse to the interests of the consuming public and inconsistent with the primary purpose of the Natural Gas Act.

I.

The decision below is in conflict with this Court's *Catco* decision.

The conflict between the decision below, affirming respondent's unconditional certification of the instant sales, and the decision of this Court, remanding respondent's unconditional certification of the Catco sales, is, we think, made immediately apparent by the following comparison of the basic facts of the two transactions.

	Catco	Seaboard
Proposed initial price	22.4¢	22.4¢ to 23.3¢
Reserves (trillion cubic feet)...	1.75	2.0
Purchasing area	Offshore Louisiana	On and offshore Louisiana
Pipeline purchaser	Tennessee Gas Transmission Co.	Transcontinental Gas Pipe Line Corp.
Number of sellers	4 (one large package)	26 (many small packages)

	Catco	Seaboard
Periodic step escalation	2¢ every 4 years	2¢ every 4 years
Favored nation escalation clause	No (except on certain contingencies)	No
Price redetermination clause	No	No
Pipeline's previous high purchase price (including tax)	18.0¢	17.0¢
Triggering of pipeline's other prices	None proven	Yes ($5 million annually)
Percentage higher than pipeline's weighted average cost of gas	70%	80%
Amount of subsequent pipeline rate increase filing (attributable principally to increased costs of purchased gas)	3.2¢ per Mcf.	3.97¢ per Mcf.

This Court found that the basic facts of the Catco sales, summarized above, signalled the existence of a situation that probably would not be in the public interest. It held, consequently, that more compelling justification than that contained in the *Catco* record was essential to sustain unconditional certification at the proposed 22.4¢ initial price.

Acting upon the basis of its own Catco and Catco-engendered precedents—*and without the benefit of this Court's observations on the subject*—the Commission herein pursued its Catco course and unconditionally certificated these sales at initial prices as high as 23.3¢.

The basic facts of the instant sales manifestly "signal" the existence of a situation far more adverse to the consuming public than that indicated by their Catco predecessors. However, *the Court* below—this Court's observations on the subject notwithstanding—purported to find three factors in the Transco-Seaboard record which, it concluded, distinguished this case from *Catco* and adequately sus-

stained respondent's unenlightened issuance of unconditional certificates to these producers. These were:

1. The 22.4 to 23.3¢ Transco-Seaboard prices have, since June, 1957, come to represent the actual market price in the area, as evidenced by other sales, *starting with the Catco sales themselves*, at similar levels. Hence, unlike the Catco prices they do not, in and of themselves, initiate a new high level mark* (A-5—A-6).

2. Transco's distributing company customers would benefit from its instant purchases because the cost of natural gas at the city gates would, notwithstanding the instant prices, remain lower than the cost to them of producing equivalent quantities of manufactured gas (A-6).

3. Transco had demonstrated its need for the gas, in the consolidated record, by reflecting its inability to meet its customers' requests for additional gas from its existing reserves. In contrast, Tennessee had not so established its need for the Catco reserves on the record underlying the Catco certification order (A-4—A-5).

In taking it upon itself to *distinguish* this case from *Catco* in the first place and in relying upon these factors to do so, the Court below is doubly in error. The cited factors do not constitute, nor do they eliminate the necessity for, the

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* In this respect, first the Examiner, then the Commission and then the Court below were led astray. Four of the Transco-Seaboard contracts did in fact initiate a new high price plateau, in the very area in which the Catco contracts had performed a similar feat one year earlier. The Catco offshore Louisiana prices were 21.4¢ (ex tax). The Transco-Seaboard offshore Louisiana prices were the first to reach 22.0¢ (ex tax). The Examiner's error in this respect was called to the respondent's attention in petitioner's Exceptions to the Examiner's decision (not a part of the Record) and in its Application for Rehearing of Opinion 315 (R. 584). The same error was brought to the attention of the Court below in brief, upon oral argument and in application for rehearing.

kind of evidence this Court indicated was required to support producer initial price proposals at these levels.

A. The rapid advance of initial prices to and beyond the Catco level makes more, not less, imperative producer justification for these prices.

Of course a large (and still growing) number of sales at prices equal to or higher than Catco's were certificated in the southern Louisiana area following the Commission's certification of the Catco sales in June, 1957. This petitioner brought that very circumstance to the attention of this Court and advanced it as the primary reason for reversal of the Catco certification.* We cited *these very* Transco-Seaboard contracts and the Commission's disposition of them as the primary example of that post-Catco development.** Clearly prompted thereby, this Court observed:

> "The price certificated [in Catco] will in effect become the floor for future contracts in the area. This has been proven by conditions in southern Louisiana where prices have now vaulted from 17 cents to over 23 cents per Mcf. New price plateaus will thus be created as new contracts are made and unless controlled will result in 'exploitation' at the expense of the consumer, who eventually pays for the increases in his monthly bill." *Atlantic Refining Co.* v. *Public Service Commission, supra*, at p. 390.

This very proceeding represents not only the inspiration for that observation, but epitomizes the accuracy of every

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* Brief for Respondent Public Service Commission of the State of New York in *Atlantic Refining Co., et al.* v. *Public Service Commission, et al.*, Nos. 518 and 536, October Term, 1958, at pp. 36-43.

** *Ibid.* at pp. 41-42. See also Brief for Public Service Commission, *amicus curiae* in *Oklahoma Natural Gas Co.* v. *F. P. C.*, cert. granted 358 U. S. 877, cert. dismissed, 358 U. S. 948.

single aspect thereof. The price certificated in Cateo literally did "become the floor for" the Transco-Seaboard contracts, as, indeed, it also became the floor for the other sales contracts cited by the Court below as representative of the new actual market price in the area* and for numerous other sales not specifically mentioned in its opinion.**

The existence of this state of affairs—i.e., respondent's frequent repetition of its Cateo error and the consequent materialization of this Court's prediction—can hardly bear witness to the propriety thereof.

To confer legitimacy upon a Cateo descendant by reference to other Cateo progeny, certificated at similar prices upon identical principles, and by reference to the unjustified Cateo prices themselves, is the epitome of the "bootstraps" doctrine and subversive of the very essence of this Court's *Cateo* decision. There would be little purpose in this Court's requirement of further demonstration of the "reason why" for the Cateo prices (the first to pierce the pre-existing price plateau), if Cateo's descendants (the

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* Some of the sales cited by the Court were certificated in a proceeding from which, ironically, this petitioner was denied intervention on the ground that it would not be adversely affected by the determination! *Southern Natural Gas Co. et al.*, Doc. No. G-11234, Order of June 20, 1957 (unreported). The cited sales to Texas Eastern were not certificated. They were withdrawn and replaced by another proposal involving different and somewhat lower producer compensation. *Texas Eastern Transmission Co. et al.*, Doc. Nos. G-12446 *et al.*, Opinion No. 322, . . . F. P. C. . . . (June 23, 1959).

** Petitioner does not dispute that these prices represent the "actual market price" in the sense of the lowest price at which the gas could be obtained in the *unregulated* sellers' market. Neither did it contend that the Cateo price, although several cents above the previous maximum level, was not the "actual market price" in the same sense. The question in both *Cateo* and the instant case is whether that price, in light of the reason for its existence and in view of its impact upon the consuming public, is the price required by public convenience and necessity under the Natural Gas Act.

third, fourth, etc. piercings) are to escape the same obligation simply because they are similar to Catco and to every other erroneous certification made before this Court proclaimed the Commission's fundamental Catco error.*

B. The Court's expressed conception that distributing companies will achieve "savings" by purchasing higher priced gas is without foundation. Moreover, the comparative economy of natural gas over manufactured gas or other fuels is in no way probative of the propriety of the producer initial prices.

There is no doubt that natural gas, at the Catco price, at the Transco-Seaboard prices, or at levels well in excess of those here in dispute, is less expensive than the cost to gas distribution companies of producing equivalent volumes of manufactured gas. The fact is one of common knowledge and certainly not disputed by petitioner. We respectfully submit, however, that this truism has little if any bearing on the question whether the instant sales at the proposed initial prices are required by public convenience and necessity, and serves in no way to distinguish the present case from *Catco*. In this belief petitioner is apparently in accord with respondent, which has never, in Opinion 315 or elsewhere, cited or relied on this factor to support a producer certification. Neither did the *Catco* decision advert to this factor, although the Catco gas, being cheaper than the Transco-Seaboard gas, would, perforce, result in even greater "savings" as compared with the cost of producing manufactured gas.

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* Moreover, even if the Court below were correct in limiting the applicability of this Court's Catco decision to sales which, in and of themselves, initiate new post-Catco price plateaus, the instant proceeding meets the test. Opinion 315 was the first decision to authorize 23.3¢ initial prices. It was also the first *reviewable* decision to authorize 22.8¢ initial prices.

The opinion of the Court below states, however:

> "Finally, there was evidence in this case that the increased supply of natural gas would effect cost savings to Transco's customers who otherwise would be required to manufacture gas themselves at a higher unit cost in order to satisfy expanded consumer demand for gas." (A-6).

The Natural Gas Act was not enacted to syphon into the pockets of producers the benefit of the economic advantages (or "savings") others may achieve through their use of natural gas. Before the vast continental market was opened to the producers by the construction of long-haul interstate pipelines, they obtained little or nothing for most of their natural gas discoveries. Natural gas was virtually a useless and unsaleable by-product of the production of oil. In the early days of pipeline construction, producers were perfectly willing to sell this by-product for 2 or 3¢ per Mcf instead of flaring it.

It was this very factor—the comparative cheapness of natural as compared to manufactured gas—that was emphasized in persuading the New York Commission and the gas consuming public in general to look with favor upon the conversion to its use. It was this factor which prompted the very substantial expenditures necessary to accomplish the mechanical conversion of existing appliances, the dismantling of manufactured gas production equipment and the burgeoning expansion of gas distribution mains and facilities in the post-war era. Neither petitioner nor the consuming public was then advised that the economic benefits of the expanding use of natural gas were intended to accrue, *ipso facto*, to the natural gas producers. It does not now appear compatible with the statute to hold that the consuming public, having been induced to abandon other

fuels and to provide an immensely lucrative market for a product which had practically none before, must be satisfied with an ever-diminishing "squall" in "savings" without even inquiring why it is called upon to provide an ever-increasing "windfall" in receipts to the producers.

Further, the Court's finding is not factually accurate. There is evidence in this record, in the testimony of distribution company witnesses, of the costs their companies *would* incur *if* they were to supply service in excess of present send-outs by producing manufactured gas (R. 228-229, 240-241, 256-257). There is not one word of testimony that a single distribution company *would actually undertake* to do any such thing. The only witness who testified on that crucial aspect of the subject admitted quite frankly that his company would not and could not economically manufacture gas to supply additional service requests. Rather, it would be compelled to surrender potential customers to other fuel suppliers (R. 251-252).

The assumption of the Court below, therefore, that Transco's customers would otherwise manufacture gas to satisfy expanding consumer demands, is not only unsupported by evidence in this or any other record but is squarely contrary to the economic facts of life. There simply is no "expanding consumer demand for gas" *at manufactured gas prices*. The post-war history of the gas industry evidences a constant contraction both in number of manufactured gas customers and in volume of manufactured gas served. It shows volumes and classes of gas consumption today which were simply non-existent, uncalled for and unthinkable in manufactured gas days, even at pre-war manufactured gas prices. With the introduction and conversion to natural gas, with the consequent large scale dismantling of manufactured gas production equipment, with

the prohibitive, 1959, costs of reconstructing and placing such equipment into service anew, it is completely unrealistic to posit an undiminished growth of consumer gas demands at the prices manufactured gas would necessitate.

It is true, of course, that the increased supply of natural gas, even at Transco-Seaboard prices, will permit Transco and its distributor customers to continue an expansion of their sales and markets that would be economically impossible under manufactured gas conditions. Petitioner certainly has no objection, *per se*, to gas companies, rather than other fuel suppliers, acquiring an increasingly large share of the fuel consuming market. We contend, however, that such expansion, at these prices, cannot "effect cost savings" of any amount to any one. On the contrary, it is readily apparent that such expansion, at these prices, can only entail *increases* in gas distribution company costs, that the burden of such increases will be borne by *existing* and future gas consumers and that the benefits of such increased charges will be enjoyed almost exclusively by the natural gas producers—all in complete and utter contradiction of the purpose of the Natural Gas Act "to underwrite just and reasonable rates to the consumer". *Atlantic Refining Co.* v. *P. S. C.*, *supra*, p. 388.

C. Under the reasoning of the *Catco* decision, Transco's admitted "need" for additional gas cannot sustain respondent's unconditional certification of the producer sales.

It is true of course that by scheduling the pipeline certificate proceedings concurrently with the producer proceedings, rather than a year and a half later as in Catco, respondent here ensured the existence of evidence to support its finding of a pipeline "need" for additional gas, at the time the finding was made. The crux of this Court's

Catco decision, however, was not the deficiency of record proof to support the Commission's finding of Tennessee's "need" for the Catco gas.* Rather, Catco was remanded because of the deficiency of record proof to support the producer initial prices *per se*. *That* deficiency may not be cured or minimized by the simple device of consolidating the pipeline and producer proceedings.

Moreover, Transco's "need" for additional gas, as the evidence clearly shows, constituted nothing more than its ability to market successfully more gas than it then had available to sell. There is neither proof nor representation that Transco required immediate new purchases to satisfy adequately demands of the *present* ultimate consumers served through its facilities.

Again, petitioner disavows any objection, *per se*, to a pipeline's desire to increase its sales and expand its markets. Moreover, we believe a pipeline's ability to market the additional gas it seeks to purchase can virtually be assumed, short of proof of corporate mismanagement, from its very execution of a gas purchase contract. Further, we concede that the existence of a pipeline "need" for (i. e., ability to market) additional gas may countenance the issuance, rather than the outright denial, of producer certificates authorizing additional sales to it.

We believe, however, that under this Court's decision, pipeline ability and desire to market additional gas cannot sustain a conclusion that *unconditional* producer certificates are required by the public convenience and necessity

> (1) where the pipeline's desire for expansion would be accommodated only at the cost of increased charges to its existing customers, occasioned by the new high-price certification in question, and

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* Compare the concurring opinion, 360 U. S. 394.

(2) where issuance of price conditioned certificates would accommodate *both* the expansive desires (or "needs") of the pipeline *and* the principal (though often forgotten) purpose of the Act—consumer price protection.

Petitioner would seriously question whether public convenience and necessity would require or even permit sacrifice of consumer price protection to facilitate the expansion of pipeline sales under any circumstances, even if the alternatives were necessarily inconsistent and mutually exclusive. But that issue is not even presented in this case. As this Court has pointed out, the Natural Gas Act provides perfect methods for reconciling both desiderata. In Catco, at lower initial prices, respondent twice invoked those methods. It abandoned its efforts to impose initial price conditions only after subjection to the most extreme pressures and in the belief it was confronted with an "either/or" choice between consumer price protection and pipeline expansion. This Court held improper its sacrifice of consumer price protection, even under those conditions. Here, at initial prices *more* damaging to the consuming public than Catco's were thought to be, respondent elected not even to attempt to invoke its price conditioning authority. Its stated reasons for so refusing (i.e., its theories as to the "*prima facie* case" of producer-applicants and the "burden of proof" on intervenors and its professed doubts of the legal propriety thereof) have since been totally discredited by this Court's *Catco* opinion.

Under the circumstances, petitioner respectfully submits that the *disposition* of this proceeding by the Court below pre-empts the province of the respondent Commission to make the determinations entrusted to it, in the first instance, with knowledge of all the rules of the game. Under the

circumstances, petitioner further submits that the *holding* of the Court below—that respondent's issuance of unconditional producer certificates here was "not unreasonable"—conflicts irreconcilably with this Court's decision in *Catco*.

II.

The decision below completely nullifies the purpose of this Court's order of remand in *Catco*.

This Court remanded the Catco applications to respondent for further proceedings in conformity with its opinion—i.e., for the presentation of evidence demonstrating the propriety of the 22.4¢ initial price proposals and the relationship thereof to the public convenience and necessity, or, in lieu thereof, for the imposition of 17-18¢ initial price conditions (the pre-Catco predominant price level). If the decision below is permitted to stand, summary disposition of the *Catco* case by the Commission on remand, without either the demonstration or the condition, is virtually a foregone conclusion.

The 22.4¢ prices there in issue no longer initiate a new high price plateau. In fact, they now understate the going price plateau, as evidenced by their instant progeny at up to 23.3¢ per Mcf and by their other descendants at even higher initial rates. Further, as this Court is aware, Tennessee's ability to market successfully the additional Catco gas was affirmatively established, after the Commission's Catco certification, at Docket G-11107.* On remand, therefore, Tennessee's "need" for the Catco gas, in the sense found acceptable by the Court of Appeals herein, can readily be shown to be at least as compelling as Transco's

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* Brief of Public Service Commission of New York in *Atlantic Refining Co. v. PSC., supra*, at p. 7, ftn.*

"need" for the instant supplies. Indeed, it is doubtful if anything more elaborate would be necessary for that purpose than incorporation by reference of the relevant portions of the record at Docket G-11107, into the Catco producer dockets upon remand. Finally, the persuasive effect, formerly unsuspected by respondent and the producers, of the comparative economy of natural over manufactured gas has gratuitously furnished a cheap, handy, universal and infallible justification for Catco and grossly higher producer initial prices. Catco gas at 22.4¢ can readily be shown to be more economical to Tennessee's distribution company customers (as is Seaboard 23.3¢ gas to Transco's), than would be their cost of producing equal volumes of manufactured gas.

Thus, the decision below not only permits but would seem to compel respondent now to certificate unconditionally the Catco sales with no other or better justification for their prices than that offered two years ago. Having unconditionally certificated the instant sales and having been sustained in that action, respondent could not, without discrimination, impose more stringent standards of proof upon the Catco applicants than that found satisfactory for the Seaboard applicants.

In the light of its opinion we do not believe this Court remanded Catco for the insignificant purpose of pro forma correction of technical irregularities or simply for the introduction of evidence of common knowledge. We do not believe that this petitioner's and this Court's collaborative endeavor to preserve the 17-18¢ southern Louisiana initial price level, pending some persuasive record demonstration of the public convenience and necessity for its elevation, may so readily be rendered nugatory and fruitless.

III.

The decision below has encouraged continuation of the unjustified upward trend of producer initial prices.

This petitioner had been firmly convinced that this Court's *Catco* decision would finally bring long needed stability to the chaotic and intolerable producer initial pricing situation in southern Louisiana. That decision seemed to say, very clearly, that the agreement of the producer and its pipeline purchaser upon a price, even though that agreement be the product of arms-length negotiation and even though the price be at the market—i.e., unregulated—level, is insufficient to sustain unconditional certification of an interstate sale where the sale at that level demonstrably would affect the consuming public adversely. In such a case, we thought, some compelling justification for the agreed price is essential or certificates may be issued only if conditioned so as to safeguard the consuming public.

If the requirements for such justification or price conditioning may properly be waived by the Court below and hence by the respondent in a case where the deleterious effects of the price are even more pronounced than in *Catco*, on the grounds that (1) the sale is at the market level, (2) the pipeline has shown its ability to sell the gas and (3) distribution companies would find it even more expensive to produce manufactured gas, then producer initial prices, notwithstanding the *Catco* decision, have clearly received another green light to soar to any extractable levels.

Absent collusion, virtually any price agreed to by a purchaser would represent the "going market price", in the sense of the lowest price at which the gas could be obtained in an *unregulated* sellers' market. Similarly, the pipeline

"need" of the sort here deemed persuasive will almost automatically be present so long as pipelines are responsibly managed and can show a market for the product they contract to purchase. And, for the reasons petitioner has outlined above, costs of manufactured gas are now so prohibitive as to exert no competitive pressure on natural gas prices for some time to come.

Respondent's recent producer Section 7 activities in southern Louisiana already attest the relatively insignificant impact of the *Cateo* decision as compared to that of the Court below. Since June 22, 1959 respondent has issued a total of six decisions in certificate proceedings affecting this production area, one, on rehearing, on July 22* and the remainder on August 10, 6 days after entry of the decision below.** In each, the record before the Commission on the producer applications was essentially identical with that before it in the instant proceeding and in Cateo. In none did it impose an initial price condition. In each it unconditionally authorized initial prices of 23.55¢ per Mcf or above (up to 24.05¢ per Mcf). In each, it purported to be guided by the decision of this Court as embossed upon (undermined) by the decision below. In each, it has promised to take appropriate action with respect to producer initial prices, of the *type* this Court contemplated, but

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* *Trunkline Gas Co. et al.*, Doc. Nos. G-1539 *et al.*, Op. No. 321, . . . F. P. C. . . . (May 22, 1959). Application for Rehearing rejected. . . . F. P. C. . . . (July 22, 1959), review pending, *Public Service Commission v. Federal Power Commission*, C. A. D. C. No. 15365 (September 14, 1959).

** *Texas Gas Transmission Co. et al.*, Doc. Nos. G-17335, Op. No. 327 . . . F. P. C. . . . (August 10, 1959); *The California Co. et al.*, Doc. No. G-16108, . . . F. P. C. . . . (August 10, 1959); *Sun Oil Co. et al.*, Doc. Nos. G-15122, . . . F. P. C. . . . (August 10, 1959); *Sunray Mid-Continent Oil Co.*, Doc. No. 14753, . . . F. P. C. . . . (August 10, 1959); *Superior Oil Co. et al.*, Doc. Nos. G-16380 *et al.*, . . . F. P. C. . . . (August 10, 1959).

only when presented with a proposed initial price so in excess of those *currently* in demand as to warrant such measures. The Cateo price, which this Court found inadequately supported on June 22, 1959, was only 22.4¢ per Mcf. One month later, on no better basis 24.05¢ per Mcf was certificated and is now solidly entrenched as the going, non-suspect level, both offshore and on dry land, in southern Louisiana. Petitioner and the consuming public have yet to see respondent call a halt.*

Conclusion.

For all of the foregoing reasons, it is respectfully urged that this petition for a writ of *certiorari* be granted; that the judgment of the Court of Appeals be reversed; that the respondent's instant producer certifications be vacated; and that the matters be remanded to the Commission for further proceedings upon the controlling precedent of and in accordance with *Atlantic Refining Co.* v. *Public Service Commission*, 360 U. S. 378 (1959). In lieu of the latter,

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* In one proceeding, involving gas produced in Texas and New Mexico and sold to a non-New York-serving pipeline, respondent has actually, for the first and only time since its earlier superseded Cateo orders, imposed initial price conditions. *Transwestern Pipeline Co., et al.*, Doc. Nos. G-14871, *et al.*, Op. No. 328, . . . F. P. C. . . . (August 10, 1959). There, however, the proposed initial prices were up to 6¢ above the previous maximum paid in the area. There also, however, the Commission on September 23, 1959 granted rehearing.

In southern Louisiana, where initial prices have advanced as rapidly but by more gradual stages, respondent has not yet found any price so markedly in excess of the prevailing level as to warrant exercise of its conditioning authority.

we respectfully urge that the matter be set down for argument at this term.

Respectfully submitted,

PUBLIC SERVICE COMMISSION
OF THE STATE OF NEW YORK,

By KENT H. BROWN,
Counsel.

BARBARA M. SUCHOW,
GEORGE H. KENNY,
Of Counsel.

Albany, New York,
October 9, 1959.

Appendix A.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 12,797 and 12,805

THE UNITED GAS IMPROVEMENT COMPANY,
PHILADELPHIA ELECTRIC COMPANY,
Petitioners in No. 12,797

PUBLIC SERVICE COMMISSION OF
THE STATE OF NEW YORK,
Petitioner in No. 12,805

v.

FEDERAL POWER COMMISSION,
Respondent

PAN AMERICAN PETROLEUM CORPORATION,
ATLANTIC REFINING COMPANY;
CITIES SERVICE PRODUCTION COMPANY,
HUMBLE OIL & REFINING COMPANY,
OHIO OIL COMPANY,
OIL PARTICIPATIONS INCORPORATED,
TIDEWATER OIL COMPANY,
TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
CONTINENTAL OIL COMPANY,
MAGNOLIA PETROLEUM COMPANY,
PURE OIL COMPANY,
SUN OIL COMPANY,
UNION OIL COMPANY OF CALIFORNIA,
W. H. HUNT, TRUSTEE FOR HASSIE HUNT TRUST,
PHILLIPS PETROLEUM COMPANY,
Intervenors

ON PETITIONS FOR REVIEW OF DECISION AND ORDER OF THE
FEDERAL POWER COMMISSION.

Argued June 5, 1959

Before GOODRICH, KALODNER and HASTIE, Circuit Judges.

Opinion of the Court.

(Filed August 4, 1959)

By GOODRICH, Circuit Judge.

These cases are two petitions seeking review of action of the Federal Power Commission. They present the same questions and attack the same order.[1] They have been argued together and will be disposed of in one opinion.

The Federal Power Commission has granted permanent certificates of convenience and necessity to twenty-six gas producers, involving thirty-eight applications, who have made contracts for the sale of gas produced in southern Louisiana and offshore areas to Transcontinental Gas Pipe Line Corporation (Transco) for transportation and resale in interstate commerce. The Commission also granted permanent certificates of public convenience and necessity to Transco to construct additional pipe line facilities to carry the supply of natural gas authorized by the producers' certificates.

The matters before the Commission involving this large transaction covered many items. There were contracts for the sale of gas by the producers. There were incidental and for our purposes here unimportant provisions concerning arrangements with buyers from Transco's pipe line. There was an elaborately worked out and thoroughly considered plan for the storage of gas in underground reservoirs in western Pennsylvania. There was a proposal by Transco for a huge increase in pipe line facilities to serve the New York and Philadelphia areas. Transco's capital expenditure is about $167,000,000.

While the factual background is wide the subject litigated in this review becomes a narrow one. Transco's customers called for more gas than Transco was able from its then sources to supply. Transco negotiated arms-length contracts with these twenty-six producers. There is no

[1] The opinion and order are contained in Federal Power Commission Opinion No. 315, issued September 4, 1958.

suggestion that there was any collusion in the formation of these contracts. They call for prices ranging from 22.4 cents to 23.3 cents per Mcf of gas.

It is the contention of the petitioners that the Commission abused its discretion in not attaching to the producers' certificates conditions limiting the price to be paid by Transco to a level below that set in the contracts.[2] It is pointed out by them that the price of natural gas obtained from the area here concerned has been increasing rapidly. These last certificates of convenience and necessity which approve this scale of prices will cause another general rise in gas prices, it is argued, and thus produce another loop in the rising spiral.

This is really the only point in the case, when all the argument is made: Was it an abuse of discretion for the Commission to grant these certificates without conditioning them as to price? We have said in the *Signal* case[3] that the Commission could make its certificate conditioned upon a price limitation.[4] We did not say that it must.

Since the case was submitted to this Court the Supreme Court has affirmed us in a case referred to by the parties as "CATCO".[5] We proceed in this case, therefore, with the text of the Supreme Court opinion before us. The Court

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[2] Petitioners in No. 12,797, United Gas Improvement Company and Philadelphia Electric Company, attack only the granting of the unconditional certificates to the producer applicants. Petitioner in No. 12,805, Public Service Commission of the State of New York, urges additionally that Transco's certification for the construction of additional pipe line facilities is unlawful since it is dependent on the issuance of certificates to the producers.

[3] *Signal Oil And Gas Co.* v. *Federal Power Comm'n*, 238 F. 2d 771 (1956), *cert. denied*, 353 U. S. 923 (1957).

[4] ". . . The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." 56 STAT. 84 (1942), 15 U. S. C. A. §717f(e) (1948).

[5] *Atlantic Refining Co.* v. *Pub. Serv. Comm'n*, U. S. (June 22, 1959), *affirming on other grounds, Public Service Comm'n of N. Y.* v. *Federal Power Comm'n*, 257 F. 2d 717 (3d Cir. 1958).

affirmed the Third Circuit in sending that case back to the Commission for further hearing. The grounds upon which the majority[6] rested its decision differed from those relied on by this Court and we shall, of course, keep our eye on the Supreme Court opinion rather than our own.

The Supreme Court pointed out that there had been no showing that "'the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas.'" — U. S. at —. That there is a large and immediate need for more gas in the territory served by Transco was fully developed in the testimony and made the subject of findings by the Commission.

Transco presented testimony at the producers' hearing that it would be unable to meet the estimated average day and peak day requirements of its customers from existing gas supplies. According to the evidence, without increasing its supply Transco would experience annual deficiencies of 8,162,000,000 cubic feet in 1959, 24,899,000,000 cubic feet in 1960 and 23,081,000,000 in 1961. Converted to average daily volumes, these deficiencies would amount to 22,400,000 cubic feet in 1959, 68,200,000 cubic feet in 1960 and 63,200,000 in 1961.[7] Inclusion of the gas reserves which are the subject of these proceedings would mean that Transco need not experience its first annual deficiency until 1971. Apart from the storage field aspect of its certification, Transco will supply an additional 173,634,000 cubic feet daily to its existing customers.

At the Transco hearing prepared testimony by Transco's customers indicated that in 1959 and in the following years substantial deficiencies in the supply of natural gas would exist. In sum, these gas companies, serving local

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[6] Mr. Justice Harlan, joined by Mr. Justice Frankfurter, concurred on the narrow ground that there was no evidence to support the findings that (1) "'the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas'" and (2) "'there was serious danger that petitioners' gas would be permanently lost to the interstate market unless an unconditional certificate were granted on their terms.'" ..... U. S. at .....

[7] The peak day deficiencies would total 116,800,000 cubic feet in 1959, 159,400,000 cubic feet in 1960 and 171,200,000 in 1961.

consumers, attested with facts and figures to the increased consumer demand for gas, their inability to satisfy that demand from existing supplies, and the desirability of purchasing increased quantities of natural gas rather than undertaking the more expensive task of expanding facilities and producing manufactured gas.

The Supreme Court opinion emphasizes strongly that attention must be given the price factor in deciding the question of issuance of the convenience and necessity certificate. The Court pointed out that Section 5 of the Natural Gas Act[8] is not a sufficiently adequate protection for the consumer. If the price is too high the consumer will have been paying too much for his gas while the long drawn out proceeding under Section 5 is pending and there is no provision for his getting a refund. 15 U. S. C. A. §717d (1948). Therefore, the next point necessary to consider is whether the attention given to the subject of price to be paid for the gas was sufficient on the part of the Commission and whether the conclusion it reached was reasonable.

The purchasers' certificates authorize the sale of approximately 2 trillion cubic feet of natural gas to Transco from the southern Louisiana and offshore areas at contract prices ranging from 22.4 to 23.3 cents per Mcf. The contracts do not contain favored-nation or price redetermination clauses.

The trial examiner found that these prices "are materially higher than the levels involved in Transco's prior purchases or existing contracts." Transco's highest previous rates were 17 cents per Mcf. However, these new prices do not establish "a new price plateau in the southern Louisiana shopping area."[9] The Catco price was as high as the minimum rates in the Transco contracts. Catco

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[8] 52 Stat. 821 (1938), as amended, 15 U.S.C.A. §§717-717w (1948), as amended, 15 U.S.C.A. §§717(c), 717r (Supp. 1958).

[9] Several of the producers testified that negotiations with other pipe line companies had centered around the range of prices ultimately agreed to by Transco. A few stated that they had received firm offers at these prices from other pipe line companies. There can be little doubt that the Transco contract prices actually represent the market price for natural gas in the area

involved the sale of 1.67 trillion cubic feet of gas from the offshore area at an initial rate of 22.4 cents per Mcf. The contracts contained escalation clauses calling for periodic increases in specific amounts.[10] In addition to the Catco agreements there were contracts for sales to Southern Natural Gas Company at 22.8 cents per Mcf and to Texas Eastern Transmission Corporation at 23.9 cents.[11] Two nonjurisdictional, i.e., intrastate, contracts called for delivery of about 100 million cubic feet daily at prices which would reach 25 cents per Mcf by the middle of 1960.

The trial examiner also found that ". . . Transco's purchase of gas at the proposed levels will 'trigger' many of its existing contracts. . . ."[12] The amount of the "triggering" was estimated to be $5,483,000 in 1959, $4,177,000 in 1960 and $5,192,000 in 1961. A Transco witness testified that the total effect of the new contracts, including the "trigger" of existing contracts, on Transco's purchased gas cost, system-wide, would be an increase in the rank of 2 cents per Mcf.[13] Finally, there was evidence in this case that the increased supply of natural gas would effect cost savings to Transco's customers who otherwise would be required to manufacture gas themselves at a higher unit cost in order to satisfy expanding consumer demand for gas.

The Supreme Court opinion in Catco stated clearly that "the Act does not require a determination of just and reasonable rates in a § 7 proceeding as it does in one under either § 4 or § 5." —U.S. at —. It did require "careful

[10] —U.S. at —.

[11] Comparisons are weak, however, since neither the quantities involved in these sales, nor the terms and conditions of these contracts are part of the record.

[12] Before the "triggered" increases can be passed along to purchasers, the Commission must approve the rates under the standards established in Section 4 of the Act, 15 U.S.C.A. §717c (1948).

[13] This estimate was made in the producers' hearing. Evidence in the pipe line hearing indicates that Transco's system-wide average cost of gas purchased would increase by 3 cents.

scrutiny and responsible reaction to initial price proposals of producers under §7." *Ibid.* It also recognized that § 7 requires the Commission to "evaluate all factors bearing on the public interest." *Ibid.*

It is the "all factors" aspect which makes these cases so hard to decide. One Commissioner dissented in this case as he has in several proceedings prior. Members of a careful and experienced court divide when the Commission's order comes before them for review. *Oklahoma Natural Gas Co.* v. *Federal Power Comm'n*, 257 F. 2d 634 (D. C. Cir. 1958). See also *Florida Economic Advisory Council* v. *Federal Power Comm'n*, 251 F. 2d 643 (D.C. Cir. 1957).

The balancing of the weight to be given the various factors is not unlike that which a court of equity through the years has given in deciding whether an injunction is to issue in a case before it. It involves an exercise of judgment and the reasons which sway that exercise may be hard to articulate in a particular case.

The weighing of the factors and the conclusion to be reached is a task for the Commission. If the necessary elements have not been considered, the error is one of law and subject to court correction. If they have been considered and the conclusion reached is not unreasonable, the conclusion stands whether it is the one we should have reached or not. That, in our judgment, is the case here.

The order of the Commission will be affirmed.

HASTIE, Circuit Judge, dissenting.

The opinion of the court reasons that the result reached by the Federal Power Commission in these cases is a permissible result despite the strictures of the decision rendered by the Supreme Court on June 22, 1957 in *Atlantic Refining Co.* v. *Public Service Commission*, — U.S. —. I am not now prepared to challenge that view. However, before reaching that point it seems appropriate to ask whether the Commission would have proceeded in the way it did and reached the result it reached here, had the sub-

sequent teaching of the *Atlantic Refining* case then been before it.

Certainly the *Atlantic Refining* case indicates an approach and emphasizes considerations which might well have led the Commission to a different result, with or without further inquiry as to reasonable rates, in the cases now before us. To me that conclusion is a sufficient reason for sending these cases back to the Commission for reexamination. I would vacate the orders of the Commission in the present cases and remand with instructions to reconsider in the light of *Atlantic Refining Co.* v. *Public Service Commission.*

A true Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

UNITED STATES COURT OF APPEALS,

FOR THE THIRD CIRCUIT.

No. 12,805

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
Respondent.

PAN AMERICAN PETROLEUM CORPORATION,
ATLANTIC REFINING COMPANY,
CITIES SERVICE PRODUCTION COMPANY,
HUMBLE OIL & REFINING COMPANY,
OHIO OIL COMPANY,
OIL PARTICIPATIONS INCORPORATED,
TIDEWATER OIL COMPANY,
TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
CONTINENTAL OIL COMPANY,
MAGNOLIA PETROLEUM COMPANY,
PURE OIL COMPANY,
SUN OIL COMPANY,
UNION OIL COMPANY OF CALIFORNIA,
W. H. HUNT, Trustee for Hassie Hunt Trust,
PHILLIPS PETROLEUM COMPANY,
Intervenors.

Present: GOODRICH, KALODNER and HASTIE, Circuit Judges.

Judgment.

This cause came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the Federal Power Commission in this case be, and the same is hereby affirmed.

Attest:

HARRIET G. HUMPHRYS,
Chief Deputy Clerk.

August 4, 1959

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,805

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Petitioner,

vs.

FEDERAL POWER COMMISSION,

Respondent.

Sur Petition for Rehearing.

Present: GOODRICH, KALODNER, STALEY and HASTIE,
Circuit Judges.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court

GOODRICH
Circuit Judge

Dated: September 9, 1959.

Appendix B.

The pertinent provisions of the Natural Gas Act of June 21, 1938, c. 556, 52 Stat. 821, as amended by the Act of February 7, 1942, c. 49, 56 Stat. 83 and the Act of August 28, 1958, 72 Stat. 947; 15 U. S. C. 717-717w, are as follows:

SEC. 7 (c) No natural-gas company or person which will be a natural gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be

issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

* * * * * *

SEC. 19 (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to

abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If

any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended.

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BRIEF AMICUS CURIAE OF PENNSYLVANIA PUBLIC UTILITY COMMISSION IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI

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Office-Supreme Court, U.S.
FILED
OCT. 1 [illegible]
JAMES R. [illegible]

In The
Supreme Court of the United States

October Term, 1959

NO. 459

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner

v.

FEDERAL POWER COMMISSION ET AL.,
Respondents

NO. 473

THE UNITED GAS IMPROVEMENT COMPANY,
Petitioner

PHILADELPHIA ELECTRIC COMPANY,
Petitioner

v.

FEDERAL POWER COMMISSION ET AL.,
Respondents

BRIEF AMICUS CURIAE OF PENNSYLVANIA PUBLIC UTILITY COMMISSION, IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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BRIEF AMICUS CURIAE OF PENNSYLVANIA PUBLIC UTILITY COMMISSION IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion of the United States Court of Appeals is not yet reported (See Decision printed in Public Service Commission of the State of New York Petition, Appendix A, and The United Gas Improvement Company and Philadelphia Electric Company Petition, Appendix A). The Opinion of the Federal Power Commission (R. 481-555) is reported at 20 FPC 264 (1958); the Commission's Order denying rehearing (R. 602-610) is reported at 20 FPC 571 (1958).

JURISDICTION

The asserted grounds for jurisdiction are set forth in the Petitions of the Public Service Commission of the State of New York and The United Gas Improvement Company and Philadelphia Electric Company.

QUESTIONS PRESENTED

The questions presented are set forth in the Petitions of the Public Service Commission of the State of New York and The United Gas Improvement Company and Philadelphia Electric Company.

STATUTES INVOLVED

The applicable provisions of the Natural Gas Act, 52 Stat. 821 (1938), as amended by 56 Stat. 83 (1942), 15 U.S.C. §717-717w, are printed in Appendix B of the Petition of the Public Service Commission of the State of New York and in Appendix B of the Petition of The United Gas Improvement Company and Philadelphia Electric Company.

INTEREST OF AMICUS CURIAE

The Pennsylvania Public Utility Commission is an arm of the legislature of the Commonwealth of Pennsylvania, empowered and directed by law to administer and enforce the Pennsylvania Public Utility Law, Act of May 28, 1937, P. L. 1053, 66 Purdon's Penna. Statutes Annotated 1101, which statute reposes in the Commission responsibility for the regulation of public utilities and preservation and protection of the public against unjust and unreasonable intrastate rates for public utility service.

This brief is filed pursuant to Rule 42(4) of this Court.

The issues presented by the instant case vitally affect every one of the more than two million Pennsylvania gas consumers represented by this Commission.

The Court below approved the principle that gas producers need not justify initial prices in certificate proceedings and, if this principle is established, the incessant spiral of higher gas prices will continue ever upward, particularly where they arise in the south Louisiana shopping area involved in this case, which area is a principal source of supply to all major interstate gas suppliers in Pennsylvania, and in which prices have bolted from 17¢ to the level of 23.3¢ per Mcf set in this case. New price plateaus will thus be created as new contracts are made and, unless controlled, will result in exploitation at the expense of the consumer, who eventually pays for the increases in his monthly bill, and whose interests, both the Federal Power Commission and the Pennsylvania Commission are charged with protecting.

This protection cannot be afforded the ultimate consumer if producer sales at ever-increasing prices remain unjustified and uncontrolled by the regulatory body entrusted with this responsibility, since the pipeline buyer, whose economic well-being depends on continued expansion, simply passes these increased costs on to the consumer. Obviously, in such a market, effective consumer protection against unjust and unreasonable rates cannot be accomplished unless prices are controlled when the initial sale is made. The Pennsylvania Commission thought such protection was forthcoming when this Court held in the *Phillips** case that independent producers were subject to regulation under the Natural Gas Act. It thought further

* *Phillips Petroleum Co. v. State of Wisconsin*, 347 U. S. 672 (1954).

that consumer protection from the almost interminable delay presently existing in the processing of Section 5 proceedings was forthcoming when this Court told in *Catco*[*] that the Federal Power Commission must make a "careful scrutiny and responsible reaction to initial price proposals of producers" and stated that producer "proposals must be supported by evidence showing their necessity to 'the' present or future public convenience and necessity' before permanent certificates are issued." However, if the decision of the Court below affirming the principle of market price as sufficient evidence of public convenience and necessity is not reversed, the protection afforded the consumer by the *Catco* criteria will be lost and the producers will, in effect, accomplish by this decision what they could not accomplish by legislation, namely, amendment of the Natural Gas Act to remove them from federal regulation. Thus the consumer would be left unprotected, for, as recognized by this Court, the market price for gas is determined by the highest price being paid for gas by any other pipeline company in the area. Therefore, as far as the consumer is concerned, the market price test is no test at all. It is for these reasons that this Brief *Amicus Curiae* is filed.

[*] *Atlantic Refining Co. v. New York Public Service Commission*, 360 U. S. 378 (1959).

ARGUMENT

The Court Below, While Purporting To Follow This Court's Catco Decision, Effectively Flouted It

This Court in its *Catco* decision admonished the Federal Power Commission, as follows:

> "What we do say is that the inordinate delay presently existing in the processing of 7 proceedings requires a most careful scrutiny and responsible reaction to initial price proposals of producers under 7. Their proposals must be supported by evidence showing their necessity to 'the present or future public convenience and necessity' before permanent certificates are issued. This is not to say that rates are the only factor bearing on the public convenience and necessity, for 7(e) requires the commission to evaluate all factors bearing on the public interest. The fact that prices have leaped from one plateau to the higher levels of another, as is indicated here, does make price a consideration of prime importance. This is the more important during this formative period when the ground rules of producer regulation are being evolved. Where the application on its face or on presentation of evidence signals the existence of a situation that probably would not be in the public interest, a permanent certificate should not be issued."

Applying this criterion, this Court found only evidence of arm's-length bargaining in the record to support 22.4¢ per Mcf south Louisiana off-shore prices and held that this was not substantial evidence. Hence, the Court reversed the Commission and remanded the case. In analyzing the facts, the Court found "damaging" evidence from the fact that the prices proposed (a) were seventy per cent higher than the pipeline buyer's weighted average cost; (b) were greatly in excess of the highest amount then being paid for gas by the pipeline; and (c) would trigger favored nation clauses and cause a pipeline rate increase. This same situation of utter and complete lack of price justification evidence is present in this case, as well as even stronger record evidence that the public interest will be adversely affected by the issuance of permanent certificates without a consumer-protecting condition. For example, the record in this case clearly shows that (a) the proposed prices range: support 22.4¢ per Mcf to 23.3¢ per Mcf for on and off-shore south Louisiana gas; (b) Transco up to this time was paying 16¢ per Mcf for gas purchased in Louisiana; (c) it was necessary to pay the prices proposed because of the new price established by the *Cato* sale and others subsequent to *Cato*; (d) the initial prices would clearly trigger favored nation clauses in some thirty-six Transco purchase contracts; and (e) this triggering would increase Transco's costs by almost $5 million annually, thus requiring the filing of a new pipeline rate increase. Yet, despite the virtual identity of facts in the two cases, the Court below reached a directly opposite result and approved the issuance of permanent unconditioned certificates.

The only difference between the cases is that in the case the Commission consolidated for decision only the producer certificate cases with those of the related pipeline expansion programs, whereas in *Cato* there was no similarly consolidated pipeline proceeding. In neither case, however, were the producers' initial price proposals supported by cost or any financial data. It is respectfully submitted that "careful scrutiny and responsible reaction to initial price proposals" does not mean permanent unconditioned certification on the basis of evidence of arm's length bargaining and evidence of need for gas. If that is the case, the Commission on remand in *Cato* need only to consolidate the *Cato* pipeline case with the producer cases to have a record by which to meet this Court's criteria. Obviously, the test approved by the Court below is no test at all in a business climate where the price is admittedly set by competing pipelines commencing their price offers with the highest price previously paid for gas in the area and then outbidding each other, with the gas going to the highest bidder, who need not be paid in order to prosper, and who simply passes on the increased cost to the consumer. To the contrary, evidence of arm's length bargaining in such a business climate, as in a captive market, signals the need for even stricter price scrutiny. Accordingly, we submit that the decision of the Court below affirming the Commission criteria is in error and will seriously weaken the protection afforded consumer interests by the *Cato* decision. The effect of the decision below has already become alarmingly apparent.

First of all, the prices certificated in this case have firmed up at a new price pattern slightly above the *Cato*

price in the important south Louisiana supply area. This will directly affect all gas consumers served through pipelines supplied in this area. Secondly, and perhaps of greater importance, is the effect of the lower Court's decision on the Commission decision in future certificate proceedings. If the Commission refuses to require justification of the producers' initial prices in this case, as the Court below erroneously decided to be permissible under *Cities*, the effect of that decision is greatly weakened. Unfortunately, that is precisely what has happened. In a series of recent decisions, the Commission has certificated initial prices even in excess of the prices involved here, relying on the decision of the Third Circuit:

The California Company, supra, Docket No. G-16,108 et al., August 10, 1950;

Sun Oil Company et al., Docket No. G-15,122 et al., August 10, 1950;

Sunray Mid-Continent Oil Company, Docket No. G-14,753, August 10, 1950;

Superior Oil Company et al., Docket No. G-16,380 et al., August 10, 1950;

Texas Gas Transmission Corp., et al., Docket No. G-17,335, et al., Opinion No. 327, issued August 10, 1950;

South Georgia Natural Gas Company et al., Opinion No. 325, issued August 7, 1950.

In those cases, no evidence was submitted by the producers other than proof that the proposed price was arrived at by arm's length bargaining. Hence,

the incessant spiral of initial prices continues ever upward to the intolerable detriment of the consumer.

Accordingly, unless the decision of the Court below is reversed, the consumer, for whose protection the Natural Gas Act was passed, will find the gas companies provided with a continuing "windfall" with a "consequent squall" for the consumers.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,
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9th October, 1959